United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

386

No. 21,782

JACOB H. GICHNER, et al.,

Appellants,

v.

ANTONIO TROIANO TILE & MARBLE CO., INC., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

Contending that a fire which had destroyed their warehouse was caused by the "careless smoking" of defendant Troiano's employees, plaintiffs brought suit in the District Court. Following the close of plaintiffs' case, the District Judge directed a defense verdict. The following questions are presented:

1. Where expert testimony pin-points the origin of a fire first reported at 5:35 a.m. to a portion of the warehouse where plaintiffs independently proved that defendant's employees, all smokers, were present about 4:00 a.m., and the expert further testifies that as a result of his investigation all possible causes of warehouse fires were eliminated and he is of the opinion that the fire was caused by "careless smoking," may the trial court properly direct a defense verdict on the ground that plaintiffs failed to introduce sufficient evidence of "careless smoking?"

2. Is a statement by one of defendant's employees, given to police and fire officers a few hours after the fire, in which the employee admits being present in the warehouse with other employees and a female "talking and smoking inside the front door" in the early morning hours admissible over a hearsay objection?

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Columbia (Holtzoff, J.) entered on January 25, 1968 (JA[1] 193). A notice of appeal was filed on February 13, 1968 (JA 194). This Court has jurisdiction by virtue of 28 U.S.C. § 1291. The District Court had jurisdiction by virtue of 11 D.C. Code § 961.

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[1] The abbreviation "JA" refers to the Joint Appendix prepared for the use of this Court.

STATEMENT OF THE CASE

In the early morning hours of August 11, 1963, a fire destroyed a large partitioned warehouse at 331-339 Vine Street, N. W., Washington, D. C. Jacob and Jane Gichner, plaintiffs below, own that building (JA 6). The Fireman's Fund Insurance Company, the other plaintiff, issued a Comprehensive Warehousemen's Insurance Policy to Takoma Transfer and Storage Company, lessee of 331 Vine Street, N. W., and made a number of payments to various persons as a result of fire damage (JA 7). Antonio Troiano Tile and Marble Company, a defendant below, leased 337-339 Vine Street, N. W., from the Gichners, utilizing the premises for the storage of materials (JA 7). John Whitaker, the other defendant, was Troiano's warehouse manager (JA 104).

The Gichners and Firemen's Fund brought suit against Troiano and Whitaker[2] alleging that Whitaker, three other Troiano employees, and an unidentified female guest had gained access to the premises around 3:00 a.m. on the morning of the fire with a key which Troiano had given Whitaker, and while there had consumed beer and smoked cigarettes during the course of a party (JA 2-3). Plaintiffs contended that the fire, which was first reported at 5:35 a.m. (JA 36), was caused by careless smoking on the part of Troiano's employees (JA 2-3). Troiano answered with a general denial (JA 4); Whitaker contended that the fire did not start in the Troiano premises, but rather in the premises leased by Takoma Storage, or alternatively, in vacant premises at 335 Vine Street, N. W. (JA 5).

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[2]The complaint also named Robert Lee Faulds, Frank Di Finzo, and James Elbert Hemmac as defendants. All were employees of Troiano Tile at the time of the fire (JA 116, 118-119). Di Finzo has since died (JA 118), and the complaint was dismissed as to Faulds and Hemmac because plaintiffs could not obtain service of process as to them.

Trial was before the District Court, sitting without a jury.[3] By depositions received into evidence (JA 68-73, 75-78),[4] plaintiffs proved that on Saturday night, August 10, 1963, a group of Troiano employees—Whitaker, Faulds, Di Finzo, Hermac and Crounse—went to Hogan's, a "beer joint" in Potomac Park (JA 137). The group remained at Hogan's drinking beer until it closed (JA 138). Thereafter, the men proceeded to the Starting Gate, another "beer joint" (JA 136), in Laurel (JA 120-121, 138), where they drank more beer and played the slot machines until it closed sometime after 2:00 a.m. (JA 120-122, 139).

On the way home, the men saw an unidentified female at the side of the road and stopped to give her a ride (JA 123, 140). Upon discovering that their female passenger had a "skinned knee" (JA 123, 140), the men decided to take her to the Troiano warehouse for "first aid" (JA 124, 142).

The group drove straight to the warehouse and while en route consumed more beer (JA 124). They arrived at 4:00 a.m., or a little earlier (JA 124, 144-145), and gained entry with Whitaker's key (JA 128).[5] According to their testimony, the men remained inside for about 15 minutes (JA 126, 149) while Whitaker applied an antiseptic and bandage to the lady's knee (JA 125-126, 147-149). Faulds "imagined" that there was smoking (JA 149); Whitaker could not "remember anybody smoking" (JA 127).

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[3]It was agreed that the Court would first determine the issue of liability (JA 13). Since the trial judge directed a defense verdict on liability at the close of plaintiff's case, there is no damage evidence in the record.

[4]See Rule 26, F.R.C.P.

[5]Whitaker was Troiano's warehouse manager and was the supervisory employee in charge of the premises in Mr. Troiano's absence (JA 104, 173-174). He was the only employee entrusted with a key (JA 104, 107, 175).

The group left about 4:15 or 4:30 a.m. (JA 127-128), drove around the corner and ran out of gas (JA 149). Whitaker left and walked home, reaching there about 4:45 a.m. (JA 127). Faulds, Di Finzo and the female remained in the car and fell asleep (JA 150). They were awakened by a police officer about 5:30 or 6:00 a.m., just as it was turning daylight, and could then see the warehouse on fire (JA 150-151, 153).[6] Faulds, Di Finzo and the lady were arrested for drunkeness and taken to the police precinct (JA 151).

About four hours later, Faulds made a statement to the fire inspector and police officers concerning his activities in the warehouse (JA 53-54, 153-154). The statement, in which Faulds admitted staying 45 minutes in the warehouse "talking and smoking inside the front door" (JA 185), was offered as evidence, but the trial judge sustained a hearsay objection, noting "This is so elementary I am not going to hear argument on that" (JA 55).[7]

Lieutenant Burton W. Johnson, a fire investigator assigned to the Fire Prevention Division of the District of Columbia Fire Department (JA 33-34), qualified as an expert (JA 34-35), and testified that the first report of the fire had been received at 5:35 a.m. He arrived on the scene within half an hour while the fire was still in progress and immediately began an investigation to determine the cause of the fire (JA 35-36).

Sometime after 6:30 a.m., Johnson entered the premises with the Fire Chief in charge, and took photographs of the damaged building (JA 37-38).[8] Johnson observed the areas of burning, and the extent of fire damage both to the building and to the contents (JA 46-47) and determined from

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[6]The first alarm was sounded at 5:35 a.m. (JA 35).

[7]The court subsequently modified its ruling so as to receive the Faulds statement into evidence, but solely for impeachment purposes and not for the truth of the facts therein stated (JA 74).

[8]These photographs are in evidence as Plaintiffs' Exhibits 1-6, and are in the record on appeal in this Court.

this and the "char pattern" that the fire originated in the Troiano portion of the warehouse (JA 47). By observing the "burned joists or rafters" Johnson was able to ascertain that the fire had spread from the Troiano section of the building to the "warehouse building in general" (JA 47-48). Johnson explained that this was part of his investigation protocol designed to determine the cause of the fire (JA 48).

Johnson examined the electrical circuits or outlets, the furnace or other conveyors of heat in the immediate area and looked for signs of "incipient burning" (JA 48). Finding none, he excluded these items "as causes or cause for this particular fire" (JA 48). Johnson examined the Troiano portion of the warehouse for flammable material, but, except for wooden or pasteboard cartons, was unable to find any since the entire premises had been destroyed by the fire (JA 49-50).

Lieutenant Johnson was asked whether, based upon his investigation of the fire, he had formed an opinion as to the cause (JA 57). He replied "that the fire was caused by careless smoking on the premises at the address in question * * * the Troiano property" (JA 58). On examination by the trial judge, Johnson explained that he reached his opinion by eliminating every other suspected cause of fire (JA 58-59).[9]

Plaintiffs also proved that the Troiano warehouse was used for stocking ceramic tile (JA 171) and mastic (JA 172-173). Mastic is a readily and highly inflammable substance (JA 52) and Mr. Troiano knew this (JA 173). Mr. Troiano also knew that all of his employees smoked on the premises with his permission (JA 180), and he had told his employees that it "would not hurt at all" to smoke near the mastic (JA 183). Mr. Troiano had not established any

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[9]Johnson did not "find any fresh cigarette butts" because, as he testified, any supporting evidence was burned and consumed in the fire (JA 59).

rule against smoking (JA 111-112, 180), and did not have a fire extinguisher in the premises (JA 183). Mr. Troiano did, however, forbid drinking on the premises (JA 176).

Plaintiffs introduced a copy of the Troiano lease and called the court's attention to paragraph 11 which provides that Troiano "will repair or replace any other damage caused to the demised premises by his negligence or the negligence of his servants or employees * * *" (JA 186).

Plaintiffs rested (JA 79) and defendants moved for a directed verdict (JA 79, 84). The court rendered an oral opinion (JA 98-102) holding that plaintiffs had failed to prove by a preponderance of the evidence that the fire was caused by careless smoking on the part of any Troiano employee (JA 101).[10] A judgment for defendants was subsequently entered (JA 193), and this appeal followed.

STATEMENT OF POINTS

1. The trial court improperly directed a defense verdict at the close of plaintiffs' case.

2. The trial court erroneously sustained a hearsay objection to Plaintiffs' Exhibit No. 7.

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[10]The court explicitly refrained from deciding whether, if careless smoking was the cause of the fire, Troiano would be liable either under the lease, or on a *respondeat superior* theory?

SUMMARY OF ARGUMENT

I

The testimony of a qualified expert, in this case a fire investigator with the District of Columbia Fire Department, as to the cause of a warehouse fire, which opinion is based on the expert's personal investigation and observations, is admissible. Where, as here, the expert testifies that, by eliminating all other possible causes of a warehouse fire, it is his opinion that the fire was caused by careless smoking, and pinpoints the origin of the fire to the particular area of an industrial warehouse where plaintiffs independently proved that a group of defendant's employees—all smokers—had been present at about 4:00 a.m., a short while before the fire broke out, it was error to direct a defense verdict at the close of plaintiffs' case on the ground that there was no *direct* evidence of "careless smoking."

II

Even assuming *arguendo* that plaintiffs were required to introduce direct evidence of smoking, it was error to exclude as hearsay a statement given by one of defendant's employees to police and fire officers a few hours following the fire in which the employee admitted being present in the warehouse with other employees and a female during the early morning hours "talking and smoking." Such a statement being clearly against the employee's pecuniary, penal and employment interest, is reliable and would not likely have been made were it not true, and this Court has already ruled such statements admissible.

ARGUMENT

I

The District Court appears to have held that expert testimony as to the cause of a fire is not sufficient to sustain plaintiffs' burden of proof unless it was independently cor-

roborated by direct evidence to support the expert conclusion (JA 100). While we proferred such evidence and maintain *infra*, pp. 10-12, that it was erroneously excluded, we think the District Court erred as a matter of law independently of the exclusion of the challenged evidence.

Insofar as we are aware, this Court has never decided whether expert testimony by fire inspectors is admissible to prove the cause of a fire. The Municipal Court of Appeals, relying on two clearly distinguishable decisions of this Court,[11] has held that such expert testimony is inadmissible because it concerns a matter within the common experience of the average juror. *Lewis v. Firestone*, 130 A.2d 317 (1957). We think that facet of the *Lewis* holding, which defendants relied upon in the District Court (JA 79-80), is clearly wrong.[12] Whatever may be the continuing validity of the rule excluding expert testimony as to matters within the common knowledge of judges and jurors, "[t]he possible causes of warehouse fires are sufficiently beyond the common experience of the ordinary judge or juror to justify the admission of expert opinion testimony on that issue." *George v. Bekins Van & Storage Co.*, 33 Cal. 2d 835, 205 P.2d 1037, 1044 (1949) (Traynor, J.). Federal courts have long admitted such testimony,[13] and the better rea-

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[11] *Henkel v. Varner*, 78 U.S. App. D.C. 197, 138 F.2d 934 (1943) (opinion testimony of plumber not admissible to prove defective repair of a spigot); *Kenney v. Washington Properties*, 76 U.S. App. D.C. 43, 128 F.2d 612 (1942) (opinion testimony of architect not admissible to prove "dangerousness" of hotel window design).

[12] We note that Lt. Johnson's testimony was admitted without objection and when Judge Holtzoff asked defendants' counsel whether there was objection to consideration of that testimony, counsel replied "No, sir" (JA 81).

[13] *Texas & P. R. Co. v. Watson*, 190 U.S. 287 (1903); *Fireman's Ins. Co. v. J. H. Mohlman Co.*, 91 Fed. 85 (2 Cir. 1898); *Taylor v. Reo Motors, Inc.*, 275 F.2d 699, 703 (10 Cir. 1960); *Gilbert v. Gulf Oil Corp.*, 175 F.2d 705, 709 (4 Cir. 1949) (dictum); *Central Railroad Co. v. Jules S. Sottnek Co.*, 258 F.2d 85, 87 (2 Cir. 1958).

soned state cases are in accord.[14] See generally, Annot., *Cause of Fire–Opinion Evidence*, 88 A.L.R.2d 230.

Of course, an expert on fire causation, like any other expert, must give the reasons underlying his opinion and cannot testify as to mere conclusions. But here, as the District Court explicitly found, Lt. Johnson arrived at his "careless smoking" opinion by excluding "all other possible causes" of the fire (JA 100), as a result of his investigation. Standing alone, this evidence was sufficient, for courts have long held that the cause of a fire may be established by a process whereby all other reasonable causes are eliminated. *E.g.*, *Texas & P. R. Co. v. Watson*, *supra*, 190 U.S. at 289-290; *George v. Bekins Van & Storage*, *supra*, 205 P.2d at 1044; cf. *Marrazzo v. Scranton Nehi Bottling Co.*, *supra*, 223 A.2d at 22; *United States Lighterage Corp. v. Petterson L & T Corp.*, 142 F.2d 197, 198 (2 Cir. 1944).

But, plaintiffs' case did not stand on Johnson's opinion alone. Plaintiffs proved that Troiano employees–all smokers (JA 180)–were in the very area where the fire originated just an hour or so before the first alarm was sounded (JA 34-35). Together with Mr. Troiano's admission that highly inflammable mastic was stored on the premises where he permitted smoking because "it would not hurt at all" (JA 183), Lt. Johnson's conclusion was not only reasonable, it was the only logical explanation for the fire. "There would seem to be no reasonable way for accounting for the damage other than it originated from careless smoking." *United States Lighterage Corp. v. Petterson L & T Corp.*, *supra*, 142 F.2d at 198. Since the trial judge was obligated to view the evidence, together with all permissible inferences, in a

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[14] *George v. Bekins Van & Storage Co.*, 33 Cal. 2d 835, 205 P.2d 1037, 1043-1044 (1949); *Marrazzo v. Scranton Nehi Bottling Co.*, 422 Pa. 518, 223 A.2d 17 (1966); *La Barbera v. Millan Builders, Inc.*, 191 So. 2d 619 (Fla. App. 1966); *Krause v. Apodaca*, 186 Cal. App. 2d 413, 9 Cal. Rptr. 10 (1960); *Alhambra Bowl, Inc. v. Ledbetter Sign Co.*, 211 Cal. App. 2d 777, 27 Cal. Rptr. 680 (1963).

light most favorable to plaintiffs,[15] the directed verdict was erroneously entered. Cf. *George v. Bekins Van & Storage*, *supra*, 205 P.2d at 1043-1044; *Pacific National Fire Ins. Co. v. Mickelson*, 235 F.2d 425, 427-428 (8 Cir. 1956); *Krause v. Apodaca*, 186 Cal. App. 2d 413, 9 Cal. Rptr. 10 (1960); *La Barbera v. Millan Builders, Inc.*, 191 So. 2d 619 (Fla. App. 1960).

II

Even assuming that plaintiffs were required to introduce direct evidence of "smoking in the premises prior to the fire," as the District Court seems to have held (JA 100), a new trial is nevertheless required. Plaintiffs' Exhibit 7 (JA 185), a statement given by Faulds to Lt. Johnson and police officers just four hours after the first alarm was sounded (JA 35-36, 185), was proffered to prove that very fact. At the interview, Faulds admitted that he and the other Troiano employees "went in the back door and sat around talking and smoking inside the front door" (JA 185). The District Court, however, sustained a hearsay objection to this evidence (JA 55).[16] As we proceed to demonstrate, this was error.[17]

By traditional definitions,[18] Faulds' statement was clearly hearsay. But that is the beginning of the inquiry, not the

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[15] *E.g.*, *Machanic v. Story*, 115 U.S. App. D.C. 87, 90, 317 F.2d 151, 154 (1963); *Furr v. Herzmark*, 92 U.S. App. D.C. 350, 353, 206 F.2d 468, 471 (1953).

[16] The court subsequently admitted the statement into evidence solely for the purpose of impeaching Faulds' deposition testimony (JA 74).

[17] There can be no claim that this error was harmless. With direct evidence of smoking, the other evidence not only would have precluded a directed verdict, it would have sustained a judgment for plaintiffs. *E.g.*, *Central Railroad Co. v. Jules S. Sottnek Co.*, 258 F.2d 85, 87 (2 Cir. 1958); *United States Lighterage Corp. v. Petterson L & T Corp.*, 142 F.2d 198 (2 Cir. 1944).

[18] *E.g.*, McCormick, *Evidence*, § 255 at 459-460 (1954).

end, for the "rule" excluding hearsay is riddled with exceptions."[19] The rigidity with which these common law exceptions are often applied is discouraging. More often than not, the inquiry loses sight of the *raison d'être* for receipt of the evidence, and focuses on such peripheral matters as whether the declarant actually comprehended the imminence of his demise,[20] or whether the lapse of 30 minutes, as opposed to 15, was sufficient to interrupt the "res gestae."[21] Disenchanted with such minutae, scholars,[22] judges[23] and occasionally the courts[24] have urged a single test whereby reliability would be the touchstone.[25]

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[19]Judge Talbot Smith, with tongue in cheek, recently commented, "Somewhere I have read that the rule has thirty-two exceptions, but I doubt this because new ones are being invented daily." Smith, *The Hearsay Rule and the Docket Crisis: The Futile Search for Paradise*, 54 A.B.A.J. 231, 235 (1968).

[20]*E.g.*, *Mattox v. United States*, 146 U.S. 140, 151-153 (1892).

[21]Compare the cases collected in Annot., 4 A.L.R.3d 149 § 9[a] (statements made from 10 to 30 minutes following attack held admissible) with § 9[b] (statements made from 10 to 30 minutes following attack held inadmissible).

[22]E.g. V *Wigmore on Evidence*, §§ 1427, 1476 (3d ed. 1940); Maguire, *Common Sense and Common Law*, 147-165 (1947); McCormick, *Evidence*, §§ 300-305 (1954).

[23]In addition to Judge Smith's article, *supra*, n. 19, see Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 N.Y. City Bar Ass'n. Lectures on Legal Topics 99 (1926), quoted in McCormick, *Evidence*, § 302 at pp. 628-629.

[24]The classic example is Judge Wisdom's opinion in *Dallas County v. Commercial Assurance Co.*, 286 F.2d 388 (5 Cir. 1961). See also, *Maroon v. INS*, 364 F.2d 982, 988-989 (8 Cir. 1966); *United States v. 60.14 Acres of Land*, 362 F.2d 660, 666-667 (2 Cir. 1966); *United Services Automobile Assn. v. Wharton*, 237 F. Supp. 255, 257-260 (W.D. N.C. 1965).

[25]Necessity, the general predicate for receipt of any hearsay evidence, was clearly established in this case for Faulds was not present to testify, and plaintiffs' efforts to serve him with a subpoena were unavailing (JA 56).

The decisions of this Court, it seems to us, trend in that direction. *E.g., KLM v. Tuller*, 110 U.S. App. D.C. 282, 292 F.2d 775, 782-784, *cert. denied*, 368 U.S. 921 (1961). Nevertheless, old traditions die hard, and the cases still tend to treat admissibility under "approved" exceptions. So will we.

The "exception" we urged below was that Faulds' statement was a declaration against interest (JA 55). That "exception" to the hearsay rule is predicated on the assumption that one is not likely to make such a statement unless that statement is true. In this case, Faulds admitted to police and fire officers that he was present in the warehouse "talking and smoking" at 3:00 to 3:45 a.m., following a night of drinking (JA 185). That statement was clearly against Faulds' pecuniary, penal and employment interest. In short, it has all the earmarks of reliability, for it was highly unlikely that Faulds would make such an admission unless it was true. This Court has squarely held such statements admissible. *KLM v. Tuller*, 110 U.S. App. D.C. 282, 292 F.2d 775, 782-784, *cert. denied*, 368 U.S. 921 (1961); *Wabisky v. D.C. Transit System, Inc.*, 114 U.S. App. D.C. 22, 309 F.2d 317, 318-319 (1962). *Cf. Pennsylvania R. Co. v. Rochinski*, 81 U.S. App. D.C. 321, 158 F.2d 325 (1946); *Corley v. Life and Casualty Ins. Co. of Tenn.*, 111 U.S. App. D.C. 327, 296 F.2d 449, 450 (1961); *Grayson v. Williams*, 256 F.2d 61, 66 (10 Cir. 1958); *Central Railroad Co. v. Jules S. Sottnek Co.*, 258 F.2d 85, 88-89 (2 Cir. 1958) (Clark, C.J., concurring); *Martin v. Savage Truck Lines*, 121 F. Supp. 417 (D.D.C. 1954).

CONCLUSION

By reason of the foregoing, the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,

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BRIEF FOR APPELLEE ANTONIO TROIANO TILE & MARBLE CO., INC.

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APPEAL FROM THE UNITED STATES
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BRIEF FOR APPELLEE ANTONIO TROIANO TILE & MARBLE CO., INC.

COUNTERSTATEMENT OF THE CASE

The statement of the case by appellant with regard to the chronology of events of the morning of the burning of the warehouse and the progress of the trial, is adequate, but we would suggest that the facts relating to appellee's alleged negligence are as follows:

Counsel for appellant in his opening statement contended, "the evidence that we will offer will establish that the cause

of the fire was careless smoking during the course of a party conducted by employees of Troiano Tile & Marble Company, one of the employees being a Mr. Whitaker, also a defendant, who was placed in charge of that particular facility of Troiano and provided with a key which gave him access to the premises at all times."

"This party followed an evening of drinking. . ." (JA 16-17).

"Careless smoking" according to appellant's opening statement at trial (JA 26-7): "is failing to make sure that a cigarette has been properly snuffed out so that it cannot be the incipient cause of a fire; and two, smoking in the vicinity of inflammable material. And it is our contention that there was inflammable material in the Troiano warehouse, as will appear in the deposition of Mr. Troiano himself. And it is further our contention that this fire, having started by careless smoking at the time stated and under the circumstances stated, thereby spread from the Troiano warehouse to the balance of the premises at Vine Street owned by the Gichners, including those premises which were under lease to Takoma Storage & Warehouse Company." (JA 26-7).

> "THE COURT: I would like to pin point your contention. You claim the fire was caused by failure to put out a cigarette?
>
> "MR. DICKSTEIN: That is correct, Your Honor, during the course of a party which was being conducted on the Troiano premises." (JA 28)

The appellants' theory of liability of the corporate defendant was as follows (JA 28):

> "First, Troiano knew, or should have known, that there was drinking and smoking by his employees on the premises and failed to take adequate steps to prevent or preclude such drinking and smoking.
>
> "Second, Troiano provided Whitaker, one of the employees, with a key which gave Whitaker access to the premises at all times and at all hours, including 3 o'clock in the morning, the time this fire started."

The flammable material, according to the appellant's expert, was "the wrapping or packing material that was between the tile as it came in the cartons, both wooden and pasteboard cartons, found in the warehouse." (JA 49).

He was unable to state there was "mastic or residue of mastic" in the warehouse. And though Troiano testified that he maintained an inventory of mastic, he did say that smoking near the mastic would not hurt at all (JA 183).

About "careless smoking" the expert testified: "The reverse of normal smoking, sir, where the average individual would have, for his cigarette, pipe or cigar, an ash tray in which to place it when he does not have it in his hand or in his mouth. In the absence of this, persons might lay a cigarette, say, on the bench or attempt to snuff it out on the floor, rather than in an ash tray, in careless smoking not exercising proper care and caution so as to possibly endanger the surroundings" (JA 58). In his final conclusion in response to a question by the court was as follows:

> "THE COURT: So that your opinion that this was caused by careless smoking is reached by eliminating other possible causes?
>
> "THE WITNESS: That is correct, sir." (JA 59).

With regards to testimony of smoking on the premises appellant admits the evidence at trial was that there was no smoking on the premises that morning, but that the fact finder can infer the contrary (JA 92).

Fauld's statement (JA 185) which contained two phrases regarding smoking:

1) "so we went in the back door and sat around talking and smoking inside the front door" and

2) "but it was possible that maybe one of us dropped a match or cigarette and caught the place on fire."

It is interesting to note that Fauld's, in his deposition on the subject of smoking in the warehouse that morning, said:

"I couldn't say right off-hand. I imagine they were, I don't know. I didn't pay particular attention" (JA 149) and later in the deposition, appellant's counsel asked if he made a statement to the fire marshal, but then asked no questions as to what he may have told the fire marshal (JA 153).

On the question of corporate liability, appellant agreed that Whitaker was acting outside the scope of his employment in going to the warehouse that night (JA 95) and therefore his only theory of liability was:

> "MR. DICKSTEIN: I was about to say, Your Honor, one has an obligation to maintain and control premises under one's control in a manner—
>
> "THE COURT: I don't have much sympathy with Ross against Hartman, but, of course, it is the law of this jurisdiction.
>
> "MR. DICKSTEIN: —in a manner which will not be harmful to third parties.
>
> "When Whitaker is entrusted with the key, when Whitaker is thereby permitted to have 24-hour-a-day-7-day-access, where there is, again I reiterate, smoking, drinking, uncontrolled, a pattern; all of these put together we think spells out—" (JA 96).

It is, therefore, the position of the appellee that the facts do not establish 1) that there was a party, or 2) that mastic material was in any way involved in the conflagration, or 3) that there was drinking on the premises on the morning involved, or 4) that the corporate defendant was in any wise appraised of the events of that night, or 5) that he failed to do anything required of him to prevent access of his employees to the warehouse or 6) that he violated any duty of due care and in the factual context presented by the appellants herein.

SUMMARY OF ARGUMENT

1. The opinion of the fire investigator, Lieutenant Johnson, that the fire was started because of careless smoking lacked any foundation in the evidence of record and therefore the trial court properly ruled that this opinion was insufficient and correctly entered judgment for appellee.

2. The extra-judicial statement by Robert Lee Faulds made to the firemen and police after the fire was properly excluded as proof of the truth of its contents on the ground that it was hearsay and was not a declaration against interest.

3. As to this appellee, the errors alleged are harmless because appellee was entitled to judgment in any event.

ARGUMENT

I.

On the basis of his personal expert observation of the area of the warehouse where he concluded that the fire started, Lieutenant Johnson found no electrical circuits, no materials that could have caused a spark or arc, and no furnace or heater or element that could have created sufficient heat to start the fire. He therefore then concluded that the fire was started by someone entering the premises and from this hypothesis he surmised that the fire was caused by careless smoking. He could find no cigarette butts in this area and his opinion was not otherwise supported by any physical evidence. Of appellee's employees who were in the warehouse on the morning of the fire, John Whitaker could not remember that anyone smoked and Robert Lee Faulds "imagined" there was smoking, but did not really know.

While Lieutenant Johnson noticed cartons and boxes in the warehouse, he did not indicate where he saw them, and he did not remember seeing any of the flammable mastic in the warehouse. The evidence was that the mastic material was in cans and that the warehouse floor was concrete

and there was no rule against smoking. The evidence does not show that the men were in the warehouse for any party or that there was any drinking in the warehouse, but that the men were there for the apparently humanitarian purpose of using the supplies at the warehouse to give first-aid to their female companion's skinned knee. For all that was disclosed by the evidence, the men were there briefly for this purpose, there was no smoking, and if any of them was smoking, there is nothing to show they were near any of the mastic or that they were otherwise smoking carelessly. The only evidence that there was smoking was the statement by Faulds which the trial court excluded as proof of its contents. Thus, there is absolutely no evidence in the record that could supply reasonable factual foundation for Lieutenant Johnson's surmise that the fire was caused by careless smoking, and the trial court was therefore quite correct in ruling that this opinion was insufficient and entering judgment for appellee. The trial court's ruling is supported in this jurisdiction by the case of *St. Lewis v. Firestone*, 130 A.2d 317 (D.C. App. 1957). In that case, the court held it was error for the trial judge to have admitted a fire investigator's opinion that a fire was caused by careless smoking. The court stated:

> "It is equally well settled that the facts on which expert opinion is predicated must permit reasonably accurate conclusions as distinguished from guesswork or conjecture. The opinion must be in terms of the probable and not of the possible. We think it was improper to admit this opinion evidence, both because the situation was one not appropriate for use of an expert and because the opinion itself was admittedly wholly conjectural and uncertain. The fire investigator found no tangible evidence of any kind bearing on the causation of the fire or of negligence on the part of the decedent. . . ." (p. 319)

None of the cases cited by appellants is contrary to this rule that an expert's opinion must have adequate foundation in the evidence of record. The following cases further

illustrate the application of this rule to expert opinions of the causes of fires:

In the case of *Brownhill v. Kivlin*, 317 Mass. 168, 57 N.E.2d 539 (1944), the plaintiff possessed a two-car garage, one half of which he rented to the defendant's intestate. In a suit to recover for the negligent burning of this garage, the plaintiff's son testified that at 1:00 a.m. he observed the defendant's intestate sitting in the rear seat of his car in the garage with the dome light of the car on, the engine off, and the doors open and the radio on. By the light of the dome light, he observed a "haze" which he described as "cigarette smoke." At 3:00 that morning, he saw the garage enveloped in flames. The garage had no electrical wiring, and it was determined that the fire started in the rear seat of the car. A district fire chief testified that the cause of the fire was careless smoking, but on cross-examination, he was asked: "There was nothing in this particular garage or that you found in the examination of this car to indicate that cigarettes started the fire?", to which the fire chief answered "No; you couldn't prove that * * * the interior of the car was so badly damaged you couldn't prove anything. You couldn't prove what started the fire." He was then asked, "In other words you cannot state definitely what started that particular fire?", and he answered "No; you could not, no."

On this testimony, the court held:

> "The entry of the verdict for the defendant was right. The so-called opinion of the district fire chief that careless smoking was the cause of the fire is revealed by the cross-examination to have been no real opinion at all. . . Being merely a guess or speculation as to a fact later testified by him to be incapable of proof, this expression of conjecture must be put out of the case . . . . The presence of the deceased, even though he was smoking and alone, at 1 a.m. in the back of the automobile, where the fire started, is not enough from which to infer that he had acted negligently . . . . In short, the evidence does not

> show that the fire resulted from negligence for which the deceased was responsible rather than from a cause for which he was not." (57 N.E.2d, at 540)

See also: *Hubbard v. Quality Oil Co. of Statesville, Inc.*, 268 N.C. 489, 151 S.E.2d 71 (1966) (expert testified that explosion was caused by vapors from gasoline spilled from a gas truck delivering gasoline to plaintiff's store; the court held that the evidence was not sufficient to show that any gasoline spilled *before* the explosion); *Schwartz v. The People's Gas Light and Coke Co.*, 35 Ill. App. 2d 25, 181 N.E. 2d 826 (1962) (expert testified that a flash fire in plaintiffs' gas range could have been caused by vapor ignited by temperature above 500 degrees; the court held that the evidence did not show that the thermostat, which was set at 350 degrees at time of the fire, was defective at that time, even though it had been repaired twice before the fire and was found one month after the fire to be 200 degrees lower than the actual temperature of the range). See generally, Annotation, "Expert and opinion evidence as to cause or origin of fire," 88 *A.L.R.2d* 230, especially Section 8, concerning "Factual basis of expert testimony; sufficiency of proof."

The trial court thus properly held that Lieutenant Johnson's opinion lacked sufficient support in the evidence in this case and therefore amounted only to unfounded surmise, guess, and conjecture.

II.

The trial court was also clearly correct in excluding as proof of its contents Fauld's extra-judicial statement to the firemen and police after the fire. Appellants sought to use this statement for the truth of the facts stated; and for this reason it is, as appellants admit, hearsay under the District of Columbia test. *Kelly v. United States*, 99 U.S. App. D.C. 13, 15, 236 F.2d 746, 748 (1956).

From this, however, appellants contend that this Court should hold that hearsay evidence should not be excluded only because it is hearsay, but that the true test should be

whether the proffered evidence is reliable, even though it is hearsay.

To this, appellee would respond that hearsay evidence is excluded from judicial proceedings exactly because it *is* unreliable on the basis that there is no opportunity to cross-examine the declarant and no showing that such cross-examination is unnecessary. This, of course, is the basis for the several exceptions to the hearsay rule, which appellee would submit represent judicial recognition that in certain circumstances sufficient guarantees of truthfulness exist that hearsay evidence may safely be admitted to show the truth of the matters stated. See 5 *Wigmore on Evidence*, Sections 1362 and 1420 (3rd Ed. 1940). Appellants ultimately abandon their suggestion that this Court reject the hearsay rule and instead argue that there is sufficient assurance of reliability in Faulds' statement on the ground that it is a statement against his "pecuniary, penal and employment interest" (Appellants' Brief, p. 12).

Appellants at trial offered all of Faulds' statement. Part of that statement, being Faulds' speculation that someone in the group might have dropped a match or cigarette and thereby started the fire, was clearly objectionable as without probative value and prejudicial. In their brief, however, appellants restrict themselves to seeking admission as evidence of its truth Faulds' statement that the people in the warehouse were "talking and smoking" (Appellants' Brief, pp. (i), 4, 10, 12), and it is this they urge is a declaration against interest. This statement, however, violates no criminal law or any rule of Faulds' employment, and hence cannot be against his interest on either of these grounds. The pecuniary interest that this statement might subject Faulds to civil liability is equally groundless because the mere fact that he or the others were smoking cannot reasonably be viewed as an admission that he or they were smoking carelessly, either in the sense that they negligently handled their cigarettes or that they were smoking near the mastic or other flammable material. As indicated, there was no rule against smoking in the warehouse, the mastic was in cans, and the

floor was concrete. For this reason, this statement is not in any respect against Faulds' interest and therefore entirely fails to satisfy the exception to the hearsay rule as a declaration against interest and was thus properly excluded as evidence of the truth of its contents. This circumstances distinguishes the cases appellants cite. See *Potter v. Finan*, 6 Mich. App. 696, 150 N.W.2d 539 (1967); and *Markley v. Beagle*, 59 Cal. Rptr. 809, 66 Cal. 2d 951, 429 P.2d 129 (1967). In the *Potter* case, the person colliding with the plaintiff's automobile admitted in statements to plaintiff's investigators and to police that he had about ten bottles of beer and was intoxicated, "but not too much." The court ruled that these statements were properly excluded for the reason that they "would have offered nothing more than a qualified admission of a limited degree of intoxication. (His) true role in the question of negligent operation of a motor vehicle would have remained as much of a mystery as it does today in view of the fact that the statements reveal nothing bearing directly on his liability as regards excessive speed or negligent operation of the car." (150 N.W.2d, at 540).

In the *Markley* case, the plaintiff fell when a railing gave way on the mezzanine of a warehouse where contractors, under agreement with the warehouse owner, were removing certain equipment in part built around the guard rail on the mezzanine. One of the contractors' employees, named Hood, stated to an investigator that the workmen had removed and reinstalled the guard rail along the mezzanine from which the plaintiff fell. The court ruled that this was not a declaration against interest, "for Hood in no way admitted that he was negligent or even stated just what he did, if anything, in removing and replacing the railing." (429 P.2d, at 133).

Likewise here for the reasons stated, the mere fact that Faulds said the people in the warehouse were "smoking" is no admission of any negligence or wrongdoing, and this hearsay statement therefore lacks any guarantee of truthfulness that could entitle it to be admitted as evidence in this case.

III.

As a proper circumstance which this Court should consider as grounds for disposing of this appeal in appellee's favor (*Campbell v. District of Columbia*, 64 App. D.C. 375, 78 F.2d 725, 728 (1935)), even if the trial court committed the errors urged by appellants, these errors are harmless because in any event, appellee was entitled to judgment as a matter of law.

Even as appellants' counsel admits, appellee's employees were at the warehouse on the morning of the fire for a purpose wholly their own and completely unrelated to their employment by appellee. Appellee is not, therefore, liable on the basis that its employees were then acting in the scope of their employment. *Park Transfer Co. v. Lumbermens Mutual Casualty Co.*, 79 U.S. App. D.C. 48, 142 F.2d 100 (1944).

On their theory that appellee should otherwise have taken steps to guard against careless smoking in the warehouse at night, appellants introduced no evidence that appellee should have prohibited smoking in the warehouse or that appellee was aware or should have been aware of the presence of its employees after hours in the warehouse before the fire. Appellants introduced no evidence showing that appellee was negligent in hiring the men or that the fact that appellee entrusted Whitaker, its warehouse manager, with a key to the warehouse was anything but necessary for the efficient and convenient opening of the warehouse in the morning and closing it at night. On this basis also, appellee was entitled to judgment as a matter of law.

CONCLUSION

For the above reasons, appellee respectfully asks that the judgment of the trial court be affirmed.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,782

JACOB H. GICHNER, et al.,

Appellants,

v.

ANTONIO TROIANO TILE & MARBLE CO., INC., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

I

Save for appellees' misapprehension of our theory of liability as to the corporate defendant (Appr. Br.[1] at 2), a point we cover *infra* at pp. 2-3, we are content to reply on the analysis set forth in our opening brief as to the sufficiency of the evidence to withstand a motion for directed verdict.

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[1] The abbreviation "App. Br." refers to Appellees Brief; the abbreviation "Br." refers to Appellants' Brief.

II

Appellees contend that a statement may not be received into evidence unless, *standing alone*, it is an "admission of . . . negligence or wrongdoing" (App. Br. at 10). A single case, handed down by a three-judge intermediate appellate court in Michigan, is cited as support for this proposition.[2] Whatever may be the rule in Division Three of Michigan's Court of Appeals, this Court has clearly held admissible extra-judicial statements which do not include all elements of negligence. For example, the radio operator's statement admitted in *KLM v. Tuller*, 110 U.S. App. D.C. 282, 292 F. 2d 775, *cert. denied*, 368 U.S. 921 (1961), did not establish the carrier's wilful misconduct. Rather, as Judge Burger pointed out, it was "an important piece of substantive evidence on the issue of wilful misconduct," 110 U.S. App. D.C. at 290, 292 F.2d at 783, which "when found to be reliable" ought to be received into evidence. 110 U.S. App. D.C. at 292, 292 F. 2d at 785.[3]

To the extent that appellees suggest that Faulds' statement was not against his penal, pecuniary or employment interest (App. Br. 9-10), we rely on the statement itself (J. A. 185) and the analysis set forth in our main brief (Br. at 4, 12).[4]

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[2] *Potter v. Finan*, 6 Mich. App. 696, 150 N.W. 2d 539 (1967). Appellees' reliance on *Markley v. Beagle*, 66 Cal. 2d 951, 429 P. 2d 129 (1967) (App. Br. at 10) is misplaced. There, the declarant's statements concerned acts of third parties, and since there was nothing in the statements against the interest of the declarant, the court quite properly found no indicia of reliability and applied the hearsay rule to exclude the evidence.

[3] Similarly, the motorman's statement to a police officer upheld in *Wabisky v. D.C. Transit System, Inc.*, 114 U.S. App. D.C. 22, 309 F. 2d 317, 318-319 (1962), was merely an important piece of evidence, not an admission of negligence. See the Joint Appendix in that case, p. 26, Vol. 1488 Records and Briefs of the United States Court of Appeals for the District of Columbia Circuit.

[4] We agree with appellees that the final sentence of Faulds' statement is inadmissible. Were this a jury trial, that sentence would have

III

Appellees' harmless error argument (App. Br. at 11) is grounded on a misapprehension of our theory of corporate liability. At the outset of the trial (J.A. 13-15), plaintiffs announced that they would rely on the corporate defendant's lease "as an additional element of liability" (J.A. 15). That lease, together with the lease of another tenant stipulated to be identical in terms (J.A. 67), was admitted into evidence (J.A. 65-66). Paragraph 11 of the lease, specifically pointed out to the trial judge (J.A. 67), provides in pertinent part:

> That [lessee] will repair or replace any other damage caused to the demised premises by his negligence or the negligence of his servants or employees . . . (J.A. 189).

Whitaker and Faulds, of course, were employees of the corporate defendant at the time of the fire, and under the plain terms of the lease, the corporate appellee is liable.

Additionally, the facts that the corporate defendant had on hand substantial quantities of combustible material (J.A. 52-53, 172-173), failed to prohibit or in any way control smoking on the premises (J.A. 180, 183), although "one of the owners" (J.A. 169) knew that all the employees smoked (J.A. 180), and gave the warehouse manager (J.A. 173) the means of obtaining round-the-clock unsupervised access to the premises (J.A. 175), when viewed in their totality show—or at least would support a finding—of direct negligence on the part of the corporate defendant.

For the foregoing reasons, appellees' harmless error argument (App. Br. at 11) must be rejected, and there is no need for this Court to decide the issue which the District Court explicitly reserved in its opinion (J.A. 101).

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been deleted. But this case was tried to the court sitting without a jury and under familiar principles the entire statement was properly offered.

CONCLUSION

The judgement should be reversed and the case remanded for a new trial.

Respectfully submitted,

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